



Law Enforcement

2012 SUBJECT MATTER INDEX

Digest

Law enforcement officers: Thank you for your service, protection and sacrifice.

2012 LED SUBJECT MATTER INDEX

2012 LED SUBJECT MATTER INDEX – LED EDITORIAL NOTE: Our annual LED subject matter index covers all LED entries from January 2012 through and including this December 2012 LED. Since 1988, we have published an annual index each December. Also, since establishing the LED as a monthly publication in 1979, we have published several multi-year subject matter indexes: a 10-year index of LEDs from January 1979 through December 1988; a 5-year subject matter index from January 1989 through December 1993; a 5-year index from January 1994 through December 1998; a 5-year index from January 1999 through December 2003; and a 5-year index from January 2004 through December 2008. The 1989-1993, 1994-1998, 1999-2003, and 2004-2008 indexes, as well as monthly issues of the LED starting with January of 1992, are available on the “Law Enforcement Digest” Internet page of the Criminal Justice Training Commission (CJTC) – go to the Training Commission’s Home Page at: <https://fortress.wa.gov/cjtc/www/> and click on “Law Enforcement Digest.”

As noted above, in past years the annual subject matter index has appeared in the December LED. Beginning this year, the annual subject matter index will be a separate document. It can be found on the CJTC’s LED webpage.

ARREST, STOP AND FRISK (See also topic “Searches”)

Frisk of companion of drug paraphernalia arrestee held justified in light of factual basis for stop of the two men (i.e., two suspects’ earlier presence in suspected stolen vehicle) plus their nervous behavior and their continued ignoring of officer’s requests to keep their hands in view, not turn away, and not approach the officer. State v. Ibrahim, 164 Wn. App. 503 (Div. III, Oct. 27, 2011) – April 12:20

Washington Supreme Court holds: (1) Washington constitution’s search incident rule does not authorize search of vehicle after arrestee-occupant has been secured, despite probable cause as to evidence of crime of arrest being in the vehicle; (2) defendant Wright was lawfully stopped on reasonable suspicion of traffic infraction; and (3) the stop of Wright was not pretextual. State v. Snapp, 172 Wn.2d 177 (April 5, 2012) and State v. Wright, 172 Wn.2d 177 (April 5, 2012) – May 12:25

There is no pretext problem where officers make a traffic stop of an individual to determine the person’s name where officers already possess probable cause to arrest the person for selling drugs, though they choose tactically to not yet make the arrest. State v. Quezadas-Gomez, 165 Wn. App. 593 (Div. II, Dec. 20, 2011), review denied, 173 Wn.2d 1034 (April 24, 2012) – June 12:23

Unsupported “seizure” found in follow-up, late-night contact where, in second contact, two officers essentially cornered woman behind laundromat and asked her for identifying information. State v. Young, 167 Wn. App. 922 (Div. II, May 1, 2012) – July 12:12

Court finds probable cause to arrest for possession of controlled substance where officer observed a glass tube, consistent with a tube that could be used to ingest illegal drugs, containing a white chalky substance (even though the arrest was originally for mere possession of drug paraphernalia, which is a nonexistent crime under Washington state statutes). State v. Rose, ___ Wn.2d ___, 2012 WL 3218531 (August 9, 2012) – October 12:07

Held: 1) arrest preceded search that yielded rape suspect’s ID cards, so search incident to arrest was lawful; and 2) RCW 10.31.030’s requirement that arrestee be allowed to post bail before any booking inventory does not apply where items were seized as evidence of crime. State v. Salinas, 169 Wn. App. 210 (Div. I, July 2, 2012) – October 12:17

Split panel rejects stop by border patrol agents, holding that facts do not add up to reasonable suspicion of smuggling of aliens or drugs. United States v. Valdes-Vega, 685 F.3d 1138 (9th Cir., July 25, 2012) – December 12:12

Order to empty pockets is a search. United States v. Pope, 686 F.3d 1078 (9th Cir., July 17, 2012) – December 12:13

Shooting pepperball projectile into eye of college partier held unconstitutional seizure in violation of established case law, so no qualified immunity for officers. Nelson v. City of Davis, 685 F.3d 867 (9th Cir., July 10, 2012) – December 12:13

ARSON (RCW 9A.48.020)

For purposes of first degree arson statute, RCW 9A.48.020, “valued at” refers to market value, not value for insurance purposes; Supreme Court finds sufficient evidence to establish market value of mobile home equal to or greater than \$10,000. State v. Sweany, 174 Wn.2d 909 (July 19, 2012) – September 12:05

ASSAULT (Chapter 9A.36 RCW)

Evidence held sufficient to show that defendant inflicted substantial bodily harm and hence second degree assault under RCW 9A.36.021(1)(a) and RCW 9A.04.110(4)(b), but Washington Supreme Court disapproves of the Court of Appeals definition of “substantial bodily harm.” State v. McKague, 172 Wn.2d 802 (Oct. 6, 2011) – February 12:11

Furniture that victim struck when she was thrown by defendant is not “instrument or thing likely to produce bodily harm” for purposes of third degree assault statute. State v. Shepard, Jr., 167 Wn. App. 887 (Div. III, May 1, 2012) – September 12:17

Split court holds that aunt’s use of her car to interfere with officer’s attempt to pull over her nephew constituted assault in the second degree, but it did not constitute intimidating a public servant. State v. Toscano, 166 Wn. App. 546 (Div. III, Feb. 7, 2012) – September 12:24

ATTEMPT (RCW 9A.28.020)

In prosecution for attempted promotion of commercial sexual abuse of minor, State must prove defendant knew victim was a minor, but defendant may be convicted even where “victims” are adult undercover police officers. State v. Johnson, 173 Wn.2d 895 (Feb. 23, 2012) – June 12:20

BOMB THREATS (RCW 9.61.160)

A bomb threat made by a psychiatric patient constituted a true threat under Washington’s objective test even though the follow-up investigation revealed that the patient claimed to have a “cosmic” security clearance and lacked capacity to carry out the threat. State v. Ballew, 167 Wn. App. 359 (Div. I, March 26, 2012) – September 12:11

BURGLARY (Chapter 9A.52 RCW)

Man who violated domestic violence no-contact order excluding him from ex-wife’s residence not allowed to argue that she had consented to his presence, and that therefore he had not committed burglary. State v. Sanchez, 166 Wn. App. 304 (Div. III, Jan. 31, 2012) – August 12:18

Where man was aware that woman objected to man’s presence within her home, man could not defend against burglary charge on theory that woman’s 14-year-old daughter consented to his entry and presence. State v. Cordero, ___ Wn. App. ___, 284 P.3d 773 (Div. III, August 28, 2012) – December 12:15

CIVIL LIABILITY

Civil Rights Act lawsuits

Majority of split en banc (10-judge) panel holds in two cases that Taser use by officers was not reasonable, but that the officers are entitled to qualified immunity in both cases. Mattos v. [named law enforcement officers] and Maui County; Brooks v. City of Seattle [and named law enforcement officers], 661 F.3d 433 (9th Cir., Oct. 17, 2011) – January 12:02 (Note: on May 24, 2012, the U.S. Supreme Court denied requests in both Mattos and Brooks for discretionary review.)

Split 3-judge panel holds that case must go to trial on the question of whether detectives got search and arrest warrants for child pornography using affidavit that deliberately or recklessly contained material omissions and false statements. Chism v. Washington State, 655 F.3d 1106 (9th Cir., August 25, 2011, amended Nov. 7, 2011) – January 12:16 (Note: On April 16, 2012, the U.S. Supreme Court denied the State’s request for review.)

Deputies who were suspended without pay upon being charged with felonies must be afforded post-suspension hearings in addition to limited pre-suspension procedures. Association for Los Angeles Deputy Sheriffs v. County of Los Angeles, 648 F.3d 986 (9th Cir., August 12, 2011) – January 12:22

Ninth Circuit withdraws and supersedes prior opinion in Starr v. Baca (Civil Rights Act lawsuit by inmate against Los Angeles County Sheriff) with no substantive change. Starr v. Baca, 652 F.3d 1202 (9th Cir., July 25, 2011) – January 12:23

Officer who had history of confusing her Glock and her Taser, and who mistakenly shot

and killed detainee she intended only to tase held under estate's allegations to have used excessive force and not be entitled to qualified immunity. Torres v. City of Madera, 648 F.3d 1119 (9th Cir., August 22, 2011) – February 12:03

Nevada Department of Corrections' prohibition on individual possession of typewriters declared justified and therefore constitutional. Nevada Department of Corrections v. Greene, 648 F.3d 1014 (9th Cir., August 15, 2011) – February 12:07

U.S. Supreme Court grants qualified immunity to officers who forcibly entered residence in school-bomb-threat-rumor case where home occupant ran inside when officer asked whether there were guns in the residence. Ryburn v. Huff, ___ U.S. ___, 132 S.Ct. 987 (Jan. 23, 2012) (U.S. Supreme Court unanimously reverses Huff v. City of Burbank, 632 F.3d 539 (9th Cir., Jan. 11, 2011) March 11:02) – April 12:03

Lawsuit arising out of Nevada state prison held not to meet Eighth Amendment because harassing act of guard not "harmful enough," but claim for retaliation must go to trial. Watison v. Carter, 668 F.3d 1108 (9th Cir., Feb. 13, 2012) – April 12:08

Parents of driver shot and killed by police officer may not sue the police where: (a) a passenger in the vehicle was convicted as accomplice for assaulting police with the vehicle, and (b) shooting was held justified by jury in earlier criminal case. Beets v. County of Los Angeles, 669 F.3d 1038 (9th Cir., Feb. 10, 2012) – April 12:08

Allegations sufficient to go to trial where family alleges detective was at least reckless in omitting from search warrant affidavit fact that son-suspect was in prison, so could not have committed crime or hidden weapons from that crime in family home. Bravo v. City of Santa Maria (California), 665 F.3d 1076 (9th Cir., Dec. 9, 2011) – April 12:09

Genuine issue of material fact held to be present as to whether use of less-than-lethal beanbag shotgun, and subsequent use of lethal force against drunk and "suicidal" young man, was reasonable use of force under facts alleged by plaintiff. Glenn v. Washington County, 661 F.3d 460 (9th Cir., Nov. 4, 2011, amended Dec. 27, 2011) – April 12:11

Genuine issue of material fact exists as to whether use of pepper spray and baton against broccoli- and tomato-eating traffic detainee who was a jackass but not a safety threat in refusing to get back into his vehicle was reasonable under the facts alleged by plaintiff. Young v. County of Los Angeles, 655 F.3d 1156 (9th Cir., August 26, 2011) – April 12:12

Court grants qualified immunity to officers who entered home to seize guns after making a mandatory arrest for domestic violence assault in the fourth degree; court also holds that officers are immune from liability under RCW 10.99.070. Feis v. King County Sheriff's Office, 166 Wn. App. 525 (Div. I, Dec. 19, 2011) – April 12:22 (Note: The Washington Supreme Court denied review, 173 Wn.2d 1036 (April 24, 2012))

U.S. Supreme Court reverses Ninth Circuit decision as detectives get qualified immunity for search warrant application broadly seeking firearms and gang evidence during investigation of shooting that plaintiffs characterized as isolated DV incident; supervisor and deputy prosecutor review a factor in granting qualified immunity. Messerschmidt v. Millender, ___ U.S. ___, 132 S. Ct. 1235 (Feb. 22, 2012) – June 12:06

U.S. Supreme Court reverses Ninth Circuit decision that denied qualified immunity to temporary-contract-attorney for City of Rialto, California; Ninth Circuit erred in basing denial of qualified immunity on mere fact that the attorney was not an employee of the city. Filarsky v. Delia, ___ U.S. ___, 132 S. Ct. 1657 (April 17, 2012) – July 12:03

U.S. Supreme Court holds that every person arrested and held temporarily at holding or other jail facility may be subjected to routine close visual inspections while undressed, so long as it involves only visual inspection without touching or abusive gestures, prior to entering the general population. Florence v. Board of Chosen Freeholders of County of Burlington, ___ U.S. ___, 132 S. Ct. 1510 (April 2, 2012) – July 12:04

Ninth Circuit sua sponte withdraws opinion in A.D. v. Markgraf, California Highway Patrol. A.D. v. Markgraf, California Highway Patrol, 636 F.3d 555 (9th Cir., April 6, 2012) – July 12:04

California's all-felony-arrestee DNA statute survives Fourth Amendment challenge. Haskell v. Harris, 669 F.3d 1049 (9th Cir., Feb. 23, 2012) – July 12:05; but see October 2012 LED at page 5 for note that Ninth Circuit has ordered a rehearing in the Haskell case.

California sheriff gets qualified immunity in demotion of lieutenant who ran for sheriff against him. Hunt v. County of Orange, 672 F.3d 606 (9th Cir., Feb. 13, 2012) – July 12:05

Ninth Circuit holds that parents have a substantive due process right to control autopsy photographs against unwarranted government exploitation; former prosecutor's delivery of child autopsy photographs to the media violated this right, however, he is entitled to qualified immunity. Marsh v. County of San Diego, 680 F.3d 1148 (9th Cir., May 29, 2012) – August 12:10

Where domestic violence protection order did not specifically authorize officers to conduct a "civil standby," officer who conducted the "civil standby" while a fellow officer involved in competing DV protection orders removed belongings from the home violated the Fourth Amendment. Osborne v. Seymour, 164 Wn. App. 820 (Div. II, Nov. 9, 2011) – August 12:24

Qualified immunity denied to assistant police chief who allegedly retaliated against a clerical worker for her subpoenaed deposition testimony, on behalf of a former employee, in that former employee's lawsuit claiming a First Amendment free speech violation. Karl v. City of Mountlake Terrace, 678 F.3d 1062 (9th Cir., May 8, 2012) – November 12:02

Disclosure by police officer of allegedly abusive interrogation tactics was made in the course of his official duties and thus not protected by the First Amendment free speech clause; lawsuit based on retaliation for officer's reporting must be dismissed. Dahlia v. Rodriguez, 699 F.3d 1094 (9th Cir., Aug. 7, 2012) – November 12:08

Excessive force claims against officers executing search warrant get different assessment for the claims by non-threatening children at scene than for the claims by adults. Avina v. United States, 681 F.3d 1127 (9th Cir., June 12, 2012) – November 12:10

Shooting pepperball projectile into eye of college partier held unconstitutional seizure in violation of established case law, so no qualified immunity for officers. Nelson v. City of Davis, 685 F.3d 867 (9th Cir., July 10, 2012) – December 12:15

Officer held entitled to qualified immunity against claims that: (1) emergency spinal tap at hospital on infant over mother's objection was a due process violation, and (2) taking and keeping agitated mother from exam room violated Fourth Amendment. Mueller v. Auker, 694 F.3d 989 (9th Cir., Sept. 10, 2012, amended Oct. 25, 2012) – December 12:8

Unabandoned items left on sidewalks momentarily unattended by homeless persons get Fourth Amendment protection from summary seizure and destruction by government. Lavan v. City of Los Angeles, 693 F.3d 1022 (9th Cir., Sept. 5, 2012) – December 12:9

"Disruptive behavior" element of otherwise overbroad ordinance on city council meeting behavior saves ordinance from free speech challenge; qualified immunity for arrest is granted based on probable cause to arrest; no excessive force found. Acosta v. City of Costa Mesa, 694 F.3d 960 (9th Cir., Sept. 5, 2012) – December 12:9

Correctional institution loses argument that prisoner's consent to sexual conduct with correctional officer precludes his Eighth Amendment lawsuit regarding that conduct; officer's coercion of sex will be presumed in this context. Wood v. Beauclair, 692 F.3d 1041 (9th Cir., Sept. 4, 2012) – December 12:11

Negligence-based lawsuits

Public duty doctrine requires dismissal of lawsuit brought by estate of missing person with history of seizure disorders, where citizen called 911 to report erratic driving by vehicle matching the description of the missing person's vehicle, 911 operator accurately informed citizen that the agency would "notify troopers", and missing person was found dead a week-and-a-half later. Johnson v. State of Washington, 164 Wn. App. 740 (Div. II, Nov. 8, 2011) – July 12:22

Public duty doctrine precludes suit by widow of intoxicated pedestrian who was run over by a drunk driver 1.5 hours after officer contacted pedestrian and told him (1) to stay off City of Spokane's busy Division Street, and (2) that, if he had to be on the street, to walk facing traffic. Weaver v. Spokane County, 168 Wn. App. 127 (Div. III, May 8, 2012) – September 12:06

Court holds that city failed to preserve its challenge to a trial court instruction that allowed jury to find the city liable for negligence in the service of an anti-harassment order where the respondent on the order killed the petitioner shortly after service of the order by the police. Washburn v. Federal Way, 169 Wn. App. 588 (Div. I, July 23, 2012) – December 12:22

CIVIL SERVICE

Seattle Public Safety Civil Service Commission's reduction of discipline of untruthful officer from termination to thirty days suspension is reversed because record does not support Commission's rationale that Seattle P.D. was inconsistent in discipline; Commission ordered to reconsider its decision. Werner v. Seattle, 163 Wn. App. 899 (Div. I, Sept. 19, 2011) – February 12:14

CJTC LED INTERNET PAGE

Announcement: The 2012 edition of "Confessions, Search, Seizure And Arrest: A Guide For Police Officers And Prosecutors" by Washington Association of Prosecuting

Attorneys (WAPA) staff attorney, Pamela B. Loginsky, is available on the LED webpage under the “special topics” heading. – August 12:03

Announcement: Materials by John Wasberg addressing several legal subject areas have been updated as of August 2, 2012 and are available on the Criminal Justice Training Commission’s Internet LED page under “Special Topics.” – October 12:02

CORPUS DELICTI DOCTRINE

Corpus delicti – prima facie evidence independent of defendant’s statements establishing that victim died from criminal act – held established in murder case where body of victim has never been found, but she disappeared without warning under suspicious circumstances. State v. Hummel, 166 Wn. App. 749 (Div. I, Jan. 3, 2012) – July 12:15

CRIMINAL RULE 3.1 (ARRESTEE RIGHT TO ATTORNEY WARNINGS AND CONTACT) (See also the topic “Interrogations and confessions”)

Double-murder defendant wins argument that 1) he unequivocally asserted his right under Criminal Rule 3.1 to attorney contact, and 2) he was not given reasonable assistance to make such contact. State v. Pierce, 169 Wn. App. 533 (Div. II, July 17, 2012) – October 12:13

CRUEL AND UNUSUAL PUNISHMENT (EIGHTH AMENDMENT)

Eighth Amendment of U.S. constitution prohibits mandatory sentence of life without parole for juvenile offender in any circumstance. Miller v. Alabama and Jackson v. Hobbs, ___ U.S. ___, 132 S. Ct. 2455 (June 25, 2012) – August 12:04

Correctional institution loses argument that prisoner’s consent to sexual conduct with correctional officer precludes his Eighth Amendment lawsuit regarding that conduct; officer’s coercion of sex will be presumed in this context. Wood v. Beauclair, 692 F.3d 1041 (9th Cir., Sept. 4, 2012) – December 12:11

DOMESTIC VIOLENCE

Man who violated domestic violence no-contact order excluding him from ex-wife’s residence not allowed to argue that she had consented to his presence, and that therefore he had not committed burglary. State v. Sanchez, 166 Wn. App. 304 (Div. III, Jan. 31, 2012) – August 12:18

DOUBLE JEOPARDY

Conviction of two counts of attempting to elude a police vehicle, based on separate pursuits by two separate law enforcement agencies, does not violate the double jeopardy clause. State v. Chouap, ___ Wn. App. ___, 285 P.3d 138 (Div. II, Aug. 14, 2012) (amended Sept. 11, 2012) – December 12:18

No double jeopardy violation in charging two acts of malicious mischief committed against the same victim (police department) separately. State v. K.R., 169 Wn. App. 742 (Div. I, July 30, 2012) – December 12:22

DUE PROCESS, INCLUDING BRADY RULE (See also “Identification Procedures” topic)

Conceded Brady violation held by U.S. Supreme Court to be “material” and to require reversal in Louisiana murder case where murder defendant was not provided with detective’s notes impeaching the lone eyewitness. Smith v. Cain, ___ U.S. ___, 132 S. Ct. 627 (Jan. 10, 2012) – March 12:05

Prosecutor lawfully shared with defense attorneys Brady information relating to adverse personnel action in officer’s prior job. Doyle v. Lee, 166 Wn. App. 397 (Div. III, Feb. 2, 2012) – April 12:22

Death penalty set aside because State of California knowingly presented false testimony of key witness who claimed that she had not been promised leniency. Phillips v. Ornoski, 673 F.3d 1168 (9th Cir., March 16, 2012, amended May 25, 2012) – July 12:05

Court finds failure to disclose photographs and FBI file that State had access to but did not disclose until 2009 amounts to a Brady violation and reverses first degree aggravated murder conviction and death sentence. In re Stenson, 174 Wn.2d 474 (May 10, 2012) – July 12:08

ELECTRONIC SURVEILLANCE AND RECORDING (Chapter 9.73 RCW)

Recordings of conversations with undercover ATF agent, made in jail visiting room pursuant to court order authorizing recordings, were lawful under Privacy Act, chapter 9.73 RCW, for three alternative reasons: (1) the conversations in that setting were not private; (2) the defendant’s statements conveyed threats of harm to persons; and (3) the court orders authorizing the recordings were properly obtained, including a sufficient showing that normal investigative procedures would be insufficient. State v. Babcock, 168 Wn. App. 598 (Div. II, June 5, 2012) – August 12:16

Defendant loses constitutional, statutory challenges to admission of jail’s recordings of his phone conversations with family. State v. Haq, 166 Wn. App. 221 (Div. I, Jan. 30, 2012) – August 12:19

Split decision rejects constitutional and Privacy Act challenges by senders of text messages that officers obtained from iPhones owned by suspected drug users, and that officers subsequently used in drug deal stings. State v. Hinton, 169 Wn. App. 28 (Div. II, June 26, 2012) and State v. Roden, 169 Wn. App. 59 (Div. II, June 26, 2012) – October 12:20

ENTRAPMENT (RCW 9A.16.070)

Compliance check by Liquor Control Board using an underage, undercover agent was not a search; also, bar’s entrapment and outrageous government conduct challenges fail. Dodge City Saloon v. Liquor Control Board, 168 Wn. App. 388 (Div. II, May 15, 2012) – September 12:13

EVIDENCE LAW

Under appropriate circumstances, gang-related evidence may be introduced to establish motive; however the present case did not present such a circumstance. State v. Mee, 168 Wn. App. 144 (Div. II, May 8, 2012) – September 12:16

Admission of deceased officer's statements at trial violates hearsay rule. United States v. Duenas, 691 F.3d 1070 (9th Cir., August 16, 2012) – December 12:3

EXTORTION (Chapter 9A.56 RCW)

Threat to expose public servant's wrongdoing unless money is paid is not First Amendment protected speech. State v. Strong, 167 Wn. App. 1 (Div. III, March 15, 2012) – September 12:23

FEDERAL PREEMPTION OF STATE AND LOCAL LAWS

Much of Arizona immigration law held preempted by federal law. Arizona v. United States, ___ U.S. ___, 132 S. Ct. 2492 (June 25, 2012) – August 12:04

FIFTH AMENDMENT RIGHT AGAINST SELF INCRIMINATION (Non-interrogation circumstances) (See also topic "Interrogations and Confessions")

Triple-murder defendants lose because recorded, undercover, Royal Canadian Mounted Police (RCMP) "Mr. Big" sting did not unlawfully coerce their inculpatory statements. State v. Rafay and State v. Burns, 168 Wn. App. 734 (Div. I, June 18, 2012) – August 12:15

FIREARMS AND OTHER WEAPONS LAWS (Chapter 9.41 RCW)

Conviction under RCW 9.41.040 for unlawful possession of firearm reversed because (1) trial court in original case did not advise of firearms-rights-loss consequence of conviction, and (2) defendant was not shown to otherwise have learned of such consequences. State v. Breitung, 173 Wn.2d 393 (Dec. 29, 2011) – February 12:09

City ordinance prohibiting possession of firearms in public parks or park facilities is preempted by State law. Chan v. City of Seattle, 164 Wn. App. 549 (Div. I, Oct. 31, 2011) – March 12:21

Termination of juvenile offender's duty to register as sex offender, based in part on recommendation of treatment provider, is equivalent procedure to a "certificate of rehabilitation" based on a finding of rehabilitation under RCW 9.41.040(3) entitling juvenile to restoration of firearms rights. State v. RPH, 173 Wn.2d 199 (Dec. 1, 2011) – April 12:14

Court affirms conviction for making a false statement with respect to information required to be kept by a federally licensed firearms dealer where defendant answered that he was the actual buyer of firearms, when he was not. United States v. Johnson, 680 F.3d 1140 (9th Cir., May 29, 2012) – September 12:05

Machine guns are "dangerous and unusual weapons" that are unprotected by the Second Amendment. United States v. Henry, 688 F.3d 637 (9th Cir., Aug. 9, 2012) – December 12:11

Backseat passenger's mere proximity to weapon and knowledge of weapon's presence is insufficient to convict defendant of unlawful possession of a firearm based upon constructive possession. State v. Chouinard, 169 Wn. App. 895 (Div. II, Aug. 8, 2012) – December 12:20

FORGERY (RCW 9A.60.020)

Evidence held sufficient to convict defendant of forgery where fake social security card and fake permanent resident card were seized from defendant after he shoplifted from a store. State v. Vasquez, 166 Wn. App. 50 (Div. III, Jan. 24, 2012) – August 12:22 (Note: The Washington Supreme Court granted discretionary review of the Court of Appeals decision, and review is in process.)

FREEDOM OF SPEECH (FIRST AMENDMENT)

County noise ordinance, prohibiting honking of a vehicle horn except for a public safety purpose or originating from an officially sanctioned parade or other public event, was impermissibly overbroad, in violation of free speech protections of federal and state constitutions. State v. Immelt, 173 Wn.2d 1 (Oct. 27, 2011) – February 12:10

Threat to expose public servant's wrongdoing unless money is paid is not First Amendment protected speech. State v. Strong, 167 Wn. App. 1 (Div. III, March 15, 2012) – September 12:23

Federal Stolen Valor Act, which prohibits falsely claiming to be a recipient of military decorations or medals, violates First Amendment free speech protections. United States v. Alvarez, ___ U.S. ___, 132 S. Ct. 2537 (June 28, 2012) – October 12:03

Qualified immunity denied to assistant police chief who allegedly retaliated against a clerical worker for her subpoenaed deposition testimony, on behalf of a former employee, in that former employee's lawsuit claiming a First Amendment free speech violation. Karl v. City of Mountlake Terrace, 678 F.3d 1062 (9th Cir., May 8, 2012) – November 12:03

Disclosure by police officer of allegedly abusive interrogation tactics was made in the course of his official duties and thus not protected by the First Amendment free speech clause; lawsuit based on retaliation for officer's reporting must be dismissed. Dahlia v. Rodriguez, 689 F.3d 1094 (9th Cir., Aug. 7, 2012) – November 12:08

"Disruptive behavior" element of otherwise overbroad ordinance on city council meeting behavior saves ordinance from free speech challenge; qualified immunity for arrest is granted based on probable cause to arrest; no excessive force found. Acosta v. City of Costa Mesa, 694 F.3d 960 (9th Cir., Sept. 5, 2012) – December 12:9

IDENTIFICATION PROCEDURES: LINEUPS, PHOTO MONTAGES, AND SHOWUPS

U.S. Supreme Court holds that where officers did not purposely stage what inadvertently turned out to be "showup" identification of suspect, constitutional due process protections against suggestive ID procedures were not triggered. Perry v. New Hampshire, ___ U.S. ___, 132 S. Ct. 716 (Jan. 11, 2012) – March 12:02

Failure of victim to identify defendant in photo montage she was shown near time of crime does not preclude her identification of him at trial where no police irregularity alleged. State v. Salinas, 169 Wn. App. 210 (Div. I, July 2, 2012) – October 12:17

IDENTITY THEFT (Chapter 9.35 RCW)

Corporation qualifies as a “person” for purposes of identity theft statutes. State v. Evans, 164 Wn. App. 629 (Div. II, Nov. 1, 2011) – February 12:14 (Note: The Washington Supreme Court granted discretionary review of the Court of Appeals decision, and review is in process.)

IMMIGRATION LAW

Much of Arizona immigration law held preempted by federal law. Arizona v. United States, ___ U.S. ___, 132 S. Ct. 2492 (June 25, 2012) – August 12:04

IMPLIED CONSENT, BREATH AND BLOOD TESTS FOR ALCOHOL (RCW 46.20.308)

Commercial Driver’s License (CDL) language in implied consent warnings, given to drivers who hold a CDL and are stopped while driving their personal vehicles, is not misleading or inaccurate and did not result in actual prejudice to CDL driver. Lynch v. Department of Licensing, 163 Wn. App. 697 (Div. II, August 14, 2011; publication ordered Sept. 27, 2011) – February 12:21

State’s failure to prove interpreter gave correct implied consent warnings requires reversal of convictions based on blood draw. State v. Morales, 173 Wn.2d 560 (Jan. 26, 2012) – April 12:13

Commercial driver’s license (CDL) language in implied consent warnings, given to drivers who hold a CDL and are stopped while driving their personal vehicles, did not inaccurately or misleadingly imply that CDL disqualification would be for same length of time as the suspension or revocation of personal license. Allen v. Department of Licensing, 169 Wn. App. 304 (Div. I, July 2, 2012) – December 12:25

INDIANS (NATIVE AMERICANS) AND LAW ENFORCEMENT

Where evidence being sought relates to off-reservation offense over which State has jurisdiction, State courts have authority to issue search warrant for residence located on trust property within exterior boundaries of established Indian reservation. State v. Clark, 167 Wn. App. 667 (Div. III, April 12, 2012) – September 12:22 (Note: The Washington Supreme Court granted discretionary review of the Court of Appeals decision, and review is in process.)

INITIATIVE POWER OF MUNICIPALITIES

Automated traffic safety cameras are not a proper subject of initiative power of cities. Mukilteo Citizens for a Simple Government v. City of Mukilteo, 174 Wn.2d 41 (Mar. 8, 2012) – June 12:21

INSANITY (RCW 9A.12.010)

Evidence of knowledge of wrongfulness held sufficient to support jury’s rejection of paranoid schizophrenic murderer’s insanity defense. State v. Chanthabouly, 164 Wn. App. 104 (Div. II, Sept. 27, 2011) – March 12:23

INTERROGATIONS AND CONFESSIONS (See also the topics, “Criminal Rule 3.1,” and “Fifth Amendment Right Against Self-incrimination”)

Polygrapher's maternal questioning style, her references to "the cops," and her other tactics to put suspect at ease and convince him to tell the truth did not render his confession involuntary. Ortiz v. Uribe, 671 F.3d 863 (9th Cir., Nov. 18, 2011) – March 12:07

Special Miranda warning to juveniles about the possibility of adult court prosecution held not absolutely required, but giving the special warning is always the best practice with juveniles. State v. Miller, 165 Wn. App. 385 (Div. III, Dec. 8, 2011) – April 12:25

Considering all the circumstances, including fact that suspect Fields was told at start and later that he was free to leave at any time and return to his jail cell, Fields was not in custody for Miranda purposes – and therefore Miranda warnings and waiver were not required – where officers had him removed from his cell and questioned him about uncharged offenses allegedly committed prior to his incarceration. Howes v. Fields, 132 S.Ct. 1181 (Feb. 21, 2012) – June 12:10

Mirandized suspect held to have made an "unequivocal" request for an attorney during custodial interrogation such that questioning should have stopped; State's context-based argument is rejected. State v. Nysta, 168 Wn. App. 30 (Div. I, May 7, 2012) – July 12:09

Washington Supreme Court overrules State v. Davis and holds that statements to police are not inadmissible at trial merely because State fails, without explanation, to call a second police officer to corroborate defendant's waiver of Miranda rights. State v. Abdulle, 174 Wn.2d 411 (May 3, 2012) – July 12:06

Three Miranda holdings in November 2011 U.S. Supreme Court decision: (1) Missouri v. Seibert's bar against admission of all statements obtained in intentional 2-step law enforcement attempt to finesse Miranda is distinguished on facts of this case; (2) urging a properly Mirandized suspect to make a deal before his accomplice does is lawful, not improper coercion; and (3) suspect's attempt to anticipatorily invoke Miranda rights during non-custodial questioning will not bar later police contact to obtain waiver for questioning. Bobby v. Dixon, ___ U.S. ___, 132 S. Ct. 26 (2011) – August 12:05

Double-murder defendant wins argument that 1) he unequivocally asserted his right under Criminal Rule 3.1 to attorney contact, and 2) he was not given reasonable assistance to make such contact. State v. Pierce, 169 Wn. App. 533 (Div. II, July 17, 2012) – October 12:13

By 6-5 vote, Ninth Circuit panel rules that custodial suspect's ambiguous request for an attorney prior to any waiver of Miranda rights must be honored as a Miranda request for an attorney terminating any attempt at interrogation and precluding clarification. Sessoms v. Runnels, 691 F.3d 1054 (9th Cir., August 16, 2012) – November 12:06

Suspect's statement during interrogation that "I don't want to talk right now, man" must be viewed in context of what was said and done before that, and was merely his way of saying he was choosing to make police-aided written statement over making tape-recorded statement. State v. Piatnitsky, ___ Wn. App. ___, 282 P.3d 1184 (Div. I, Aug. 20, 2012) – November 12:11

Suspect's selective silence at various points during interrogation cannot be used against him at trial except for impeachment purposes. State v. Fuller, ___ Wn. App. ___, 282 P.3d 126 (Div. II, August 8, 2012) – December 12:21

INTIMIDATING A PUBLIC SERVANT (RCW 9A.76.180)

Split court holds that aunt's use of her car to interfere with officer's attempt to pull over her nephew constituted assault in the second degree, but it did not constitute intimidating a public servant. State v. Toscano, 166 Wn. App. 546 (Div. III, Feb. 7, 2012) – September 12:24

KIDNAPPING, UNLAWFUL IMPRISONMENT, AND CUSTODIAL INTERFERENCE (Chapter 9A.40 RCW)

Evidence is held insufficient to support kidnapping in the first degree conviction where would-be child victim voluntarily entered defendant's car and apartment, and where defendant took the victim home when victim requested. State v. Dillon, 163 Wn. App. 101 (Div. II, August 9, 2011) – February 12:24

LEGISLATIVE UPDATE

Part One of the 2012 Washington Legislative Update. – May 12:02

Part Two of the 2012 Washington Legislative Update. – June 12:02

2012 Legislative Index. – June 12:04

LIMITATIONS PERIOD FOR PROSECUTION (RCW 9A.04.080)

Possession of stolen property is a continuing offense and statute of limitations runs from the date the defendant last possessed the property. State v. Contreras, 162 Wn. App. 540 (Div. III, July 7, 2011) – January 12:25

LOSS OF, DESTRUCTION OF, FAILURE TO PRESERVE EVIDENCE (See also topic "Due process, including Brady rule")

Where evidence in homicide investigation was destroyed after case went cold for thirty years, Court of Appeals holds there is no due process violation because evidence was not materially exculpatory, and there was no bad faith on the part of police in destroying the evidence. State v. Groth, 163 Wn. App. 548 (Div. I, Sept. 12, 2011) – February 12:15

MALICIOUS HARASSMENT (RCW 9A.36.080)

In malicious harassment prosecution, court holds that defendant intentionally and maliciously threatened the victim because of her race, and evidence is sufficient to establish a true threat. State v. Read, 163 Wn. App. 853 (Div. I, Sept. 19, 2011) – July 12:25

MALICIOUS MISCHIEF (Chapter 9A.48 RCW)

Where defendant kicked out the back window of a police car, placing the car out of service for a day, there is sufficient evidence to convict him of malicious mischief in the second degree. State v. Turner, 167 Wn. App. 871 (Div. III, May 1, 2012) – September 12:21

MEDAL OF HONOR AND PEACE OFFICERS' MEMORIAL CEREMONY

Announcement regarding date, time and place of 2012 ceremony. – April 12:03; May 12:01

MEDICAL MARIJUANA (See also topic “Uniform Controlled Substances Act”)

Ninth Circuit denies preliminary injunctive relief, concluding that the use of medical marijuana is not protected by the Americans with Disabilities Act. James v. City of Costa Mesa, 684 F.3d 825 (9th Cir., May 21, 2012) – August 12:13

Defendant charged with manufacture and possession of marijuana should have been permitted to present an affirmative defense that he is a designated provider under the medical marijuana statute, chapter 69.51A RCW; 2011 amendments to the statute are not retroactive. State v. Brown, 166 Wn. App. 99 (Div. II, Jan. 24, 2012) – August 12:19

MUNICIPAL COURT AUTHORITY

City does not have authority to prosecute State law crimes that it has not adopted in its municipal code. City of Auburn v. Gauntt, 174 Wn.2d 321 (April 19, 2012) – July 12:09

MURDER AND OTHER NON-TRAFFIC CRIMINAL HOMICIDES (Chapter 9A.32 RCW)

Common law “born alive” rule applied: status of victim is determined at time of death, not at time of commission of crime. State v. Besabe, 166 Wn. App. 872 (Div. I, Mar. 5, 2012) – September 12:23

OBSTRUCTING (RCW 9A.76.020)

Court of Appeals rejects sufficiency-of-evidence and constitutional challenges to obstructing statute where disturbance-call occupant refused order to come to door and exit with his hands up. State v. Steen, 164 Wn. App. 789 (Div. II, Nov. 9, 2011, amended Dec. 20, 2011), review denied, 173 Wn.2d 1024 (2012) – March 12:17

OUTRAGEOUS GOVERNMENT CONDUCT

Compliance check by Liquor Control Board using an underage, undercover agent was not a search; also, bar’s entrapment and outrageous government conduct challenges fail. Dodge City Saloon v. Liquor Control Board, 168 Wn. App. 388 (Div. II, May 15, 2012) – September 12:13

PERJURY (RCW 9A.72.020)

Heightened proof requirement of perjury satisfied where evidence of the knowingly false statement is recorded prior to the hearing at which the perjury is subsequently committed. State v. Singh, 167 Wn. App. 971 (Div. III, May 3, 2012) – September 12:16

PLEA BARGAINING

State may make plea bargain conditional on defendant not moving for identification of a confidential informant. State v. Shelmidine, 166 Wn. App. 107 (Div. II, Jan. 24, 2012) – August 12:21

POSSESSING STOLEN PROPERTY (Chapter 9A.56 RCW)

Possession of stolen property is a continuing offense and statute of limitations runs from the date the defendant last possessed the property; defendant “used” vehicle in commission of felony for purposes of DOL suspension statute. State v. Contreras, 162 Wn. App. 540 (Div. III, July 7, 2011) – January 12:25

Evidence held to be insufficient to support conviction for possession of stolen access device where the defendant possessed a plastic credit card bearing another’s name, an account number, and other information that accompanied a credit card offer, but the card had not been activated or signed. State v. Rose, 175 Wn.2d 10 (August 9, 2012) – October 12:07

PUBLIC RECORDS ACT (Chapter 42.56 RCW)

Discovery in PRA cases is the same as in other civil cases; Washington Supreme Court adopts federal Freedom of Information Act standards of reasonableness regarding adequacy of search; party may be entitled to costs and fees based on wrongful failure to disclose even if requestor already possesses records prior to lawsuit – overruling Daines v. Spokane County. Neighborhood Alliance v. Spokane, 172 Wn.2d 702 (Sept. 29, 2011) – February 12:12

There is no requirement that public records be produced electronically; however, any response notifying the requestor that redactions will be made, even to say that the records cannot be produced in the format requested, triggers the Public Records Act redaction log requirement. Mitchell v. Department of Corrections, ___ Wn. App. ___, 260 P.3d 249 (Div. II, Sept. 7, 2011; amended Dec. 6, 2011) – February 12:16

Agency’s failure to respond to public records request within 5 days violates the PRA; inadvertent loss of e-mail prior to request does not violate PRA. West v. Department of Natural Resources, 163 Wn. App. 235 (Div. II, August 23, 2011) – February 12:21

Court of Appeals rejects the argument that there is no statute of limitations under the PRA. Johnson v. Department of Corrections, 164 Wn. App. 769 (Div. II, Nov. 8, 2011) – March 12:20

Daily penalty is not per individual record nor per “grouped” records. Bricker v. L & I, 164 Wn. App. 16 (Div. II, Sept. 20, 2011) – March 12:25

Snohomish County did not violate PRA by requesting clarification of request. Levy v. Snohomish County, 167 Wn. App. 94 (Div. I, Jan. 23, 2012, publication ordered March 19, 2012) – August 12:22

A federal statute, 23 U.S.C. § 409, protecting location-specific collision data does not apply to collision records collected by the Washington State Patrol pursuant to RCW 46.52.060. Gendler v. Batiste, 174 Wn.2d 244 (April 12, 2012) – September 12:06

Federal regulation requiring marine employers to keep drug and alcohol test results confidential is an exempting “other statute” under the PRA. Freedom Foundation v. Washington State Department of Transportation, 168 Wn. App. 278 (Div. II, May 10, 2012) – September 12:15

Attorney fee invoices that exceed county's deductible, and thus county never receives, are not public records under PRA. West v. Thurston County, 168 Wn. App. 162 (Div. II, May 8, 2012) – September 12:15

The PRA does not require records to be divided into separate groups based on production date. Double H, L.P. v. Department of Ecology, 166 Wn. App. 707 (Div. III, Feb. 23, 2012) – September 12:24

Guild representative has standing to bring PRA lawsuit, but letter to sheriff did not provide sufficient notice that it was a PRA request. Germeau v. Mason County, 166 Wn. App. 789 (Div. II, Feb. 28, 2012) – October 12:24

RAPE AND OTHER SEXUAL OFFENSES (Chapter 9A.44 RCW)

Mere contact between male and female sex organs does not constitute “penetration” under “sexual intercourse” definition. State v. Weaville, 162 Wn. App. 801 (Div. I, July 25, 2011) – January 12:25

Required “sexual intercourse” element of first degree child rape not met where defendant penetrates buttocks but not anus. State v. A.M. 163 Wn. App. 414 (Div. I, Sept. 6, 2011) – February 12:18

Third degree rape defendant loses argument that the jury must consider “lack of consent” from the subjective view of the defendant. State v. Higgins, 168 Wn. App. 845 (Div. III, June 19, 2012; as corrected June 21, 2012) – November 12:24

RENDERING CRIMINAL ASSISTANCE (RCW 9A.76.050)

Where there was evidence that a victim of a shooting knew who shot him and his companion, but he claimed to police that he did not know, the shooting victim did not commit rendering criminal assistance. State v. Budik, 173 Wn.2d 727 (Feb. 16, 2012) – June 12:16

ROBBERY (Chapter 9A.56 RCW)

Robbery evidence sufficient under “transactional” analysis where thief took item from person, handed it to accomplice, and joined others in using force to prevent victim from regaining possession of item. State v. Truong, 168 Wn. App. 529 (Div. I, May 29, 2012) – September 12:23

SEARCHES (See also topic “Arrest, Stop and Frisk”)

Automatic standing

Defendant caught with illegal drugs has automatic standing to challenge search of apartment where he was a guest, but his standing does not allow him to challenge search as if he were one of the tenants. State v. Libero, 168 Wn. App. 612 (Div. II, June 5, 2012) – November 12:15

Border searches by federal agents

Ninth Circuit grants motion for rehearing en banc in extended-border search case of

United States v. Cotterman. United States v. Cotterman, 637 F.3d 1068 (9th Cir., March 30, 2011) – July 12:04

Community caretaking, emergency, and exigent circumstances exceptions to warrant requirement

U.S. Supreme Court grants qualified immunity to officers who forcibly entered residence in school-bomb-threat-rumor case where home occupant ran inside when officer asked whether there were guns in the residence. Ryburn v. Huff, ___ U.S. ___, 132 S.Ct. 987 (Jan. 23, 2012) (U.S. Supreme Court unanimously reverses Huff v. City of Burbank, 632 F.3d 539 (9th Cir., Jan. 11, 2011) March 11:02) – April 12:03

Confidential informant protection

State may make plea bargain conditional on defendant not moving for identification of a CI. State v. Shelmidine, 166 Wn. App. 107 (Div. II, Jan. 24, 2012) – August 12:19

Consent exception to search warrant requirement

Girlfriend had authority to consent to search for child porn on computer that imprisoned boyfriend owned, but that he had allowed her to use without restriction and without password protection. United States v. Stanley, 653 F.3d 946 (9th Cir., Aug. 2, 2011) – February 12:08

Court of Appeals imports search-incident-to-arrest scope limits into consent search case, and holds that general consent to search car and its trunk did not include consent to search locked container in the trunk. State v. Monaghan, 166 Wn. App. 782 (Div. I, Jan. 3, 2012) – March 12:09

Deliberate or reckless omissions or false statements in search warrant affidavit

Split 3-judge panel holds that case must go to trial on the question of whether detectives got search and arrest warrants for child pornography using affidavit that deliberately or recklessly contained material omissions and false statements. Chism v. Washington State, 655 F.3d 1106 (9th Cir. August 25, 2011, amended Nov. 7, 2011) – January 12:16 (Note: On April 16, 2012, the U.S. Supreme Court denied the State's request for review.)

Exclusionary rule

Washington Supreme Court majority opinion reverses Court of Appeals decision and conviction, but, for procedural reasons, declines to address merits of parties' arguments about exclusionary rule "attenuation" doctrine. State v. Ibarra-Cisneros, 172 Wn.2d 880 (October 20, 2011) – January 12:23

Independent Source exception to exclusionary rule allows testimony and evidence of unusual ammunition purchased by defendant. State v. Hilton, 164 Wn. App. 81 (Div. III, Sept. 27, 2011) – March 12:24

Split court holds that independent source and attenuation exceptions to the exclusionary rule apply to allow testimony of assault victims that officers inadvertently discovered after random, warrantless search of motel registry for arrest warrant subjects. State v.

Smith, 165 Wn. App. 296 (Div. II, Dec. 6, 2011) – July 12:18 (Note: The Washington Supreme Court granted discretionary review of the Court of Appeals decision, and review is in process.)

Execution of search warrant, including frisking or searching persons present

Officer held to have unlawfully searched visitor's purse during execution of search warrant – she was not named in the warrant, the purse was with what were clearly her other personal effects, and she immediately claimed the purse. State v. Lohr, 164 Wn. App. 414 (Div. II, Oct. 18, 2011) – March 12:13

Media presence at execution of search warrant violates Fourth Amendment; however, evidence need not be suppressed where media did not expand the scope of or otherwise affect the search; admission of deceased officer's statements at trial violates hearsay rule. United States v. Duenas, 691 F.3d 1070 (9th Cir., Aug. 16, 2012) – December 12:3

Impound-inventory exception to search warrant requirement

Inventory of contents of impounded vehicle was permissible and not a pretext for an evidentiary search; consent is not required prior to an inventory search. State v. Tyler, 166 Wn. App. 202 (Div. II, Jan. 26, 2012) – June 12:26 (Note: The Washington Supreme Court granted discretionary review of the Court of Appeals decision; oral argument was heard October 4, 2012.)

Vehicle impound-inventory held to violate Fourth Amendment on grounds that (1) community caretaking rationale for impound not met, and (2) inventory was pretextual; also, Ninth Circuit indicates that an arrest cannot support impound-inventory if impound-inventory precedes the arrest. United States v. Cervantes, 878 F.3d 798 (9th Cir., May 16, 2012) – August 12:06

Incident to arrest (search of motor vehicle) exception to warrant requirement

Washington constitution's search incident rule does not authorize search of vehicle after arrestee-occupant has been secured, despite probable cause as to evidence of crime of arrest being in the vehicle. State v. Snapp, 172 Wn.2d 177 (April 5, 2012) and State v. Wright, 172 Wn.2d 177 (April 5, 2012) – May 12:25

Incident to arrest (search of other than motor vehicle) exception to warrant requirement

Note that review was granted in the Byrd case – Washington Supreme Court to address search-incident-to-arrest ruling that extended Arizona v. Gant to searches of personal effects; oral argument was heard on May 15, 2012 and a decision is awaited. State v. Byrd, 162 Wn. App. 612 (Div. III, July 19, 2011) – January 12:23

Court holds that 1) Arrest preceded search of person that yielded rape suspect's identification cards, so search incident to arrest was lawful, and 2) warrantless seizure at police station of suspect's clothing as evidence of crime and later lab testing were lawful as incidental to arrest were seized as evidence of crime. State v. Salinas, 169 Wn. App. 210 (Div. I, July 2, 2012) – October 12:17

Issuance, service, and return of warrant (ministerial errors)

Court rejects defense argument based on typographical and procedural errors in search under a warrant; also holds that although portion of warrant addressing “firearms, shell cases or knives” was overbroad and lacked probable cause, that portion could be severed. State v. Temple, ___ Wn. App. ___, 285 P.3d 149 (Div. I, August 20, 2012) – December 12:16

Jail intake/booking inventory

RCW 10.31.030’s requirement that arrestee be allowed to post bail before any booking inventory does not apply where items were seized as evidence of crime. State v. Salinas, 169 Wn. App. 210 (Div. I, July 2, 2012) – October 12:17

Open view

Officer lawfully observed evidence in side panel of car door under “open view” doctrine, however, seizure of that evidence without a warrant was unlawful. State v. Jones, 163 Wn. App. 354 (Div. II, August 30, 2011) – February 12:19

Privacy expectations, scope of constitutional protections (see also subtopic of “Open view”)

U.S. Supreme Court explores Fourth Amendment issues about attaching and using GPS devices on vehicles; Washington Supreme Court resolved these questions in 2003 Jackson decision adopting a warrant requirement under article I, section 7 of the Washington constitution. United States v. Jones, ___ U.S. ___, 132 S. Ct. 945 (Jan. 23, 2012) – March 12:07

California’s all-felony-arrestee DNA statute survives Fourth Amendment challenge. Haskell v. Harris, 669 F.3d 1049 (9th Cir., Feb. 23, 2012) – July 12:05; but see October 2012 LED at page 5 for note that Ninth Circuit has ordered an appellate rehearing in the Haskell case.

Area near home’s side entry door located on left wall of mostly-enclosed carport held protected private area under Fourth Amendment; Ninth Circuit rules that federal border agent unlawfully went into that private area rather than going to front door to contact resident. United States v. Perea-Rey, 680 F.3d 1179 (9th Cir., May 31, 2012) – September 12:03

Compliance check by Liquor Control Board using an underage, undercover agent was not a search; also, bar’s entrapment and outrageous government conduct challenges fail. Dodge City Saloon v. Liquor Control Board, 168 Wn. App. 388 (Div. II, May 15, 2012) – September 12:13

Split decision rejects constitutional and Privacy Act challenges by senders of text messages that officers obtained from iPhones owned by suspected drug users, and subsequently used in drug deal stings. State v. Hinton, 169 Wn. App. 28 (Div. II, June 26, 2012) and State v. Roden, 169 Wn. App. 59 (Div. II, June 26, 2012) – October 12:21

Order to empty pockets is a search. United States v. Pope, 686 F.3d 1078 (9th Cir., July 17, 2012) – December 12:13

Probable cause to search (includes staleness of probable cause)

Search warrant affidavit by experienced detective (1) asserting discovery of photo on computer of nude 15- to 17-year-old female with “nude-teens” website label, and (2) describing some additional purportedly corroborating facts held by 2-1 majority to establish probable cause to search computers for child pornography. United States v. Krupa, 658 F.3d 1174 (9th Cir., Sept. 30, 2011) – January 12:13

Supreme Court reverses Court of Appeals, holding that while search warrant affidavit establishes that affiant-detective was recently told by CI of CI’s observation of defendant’s marijuana grow operation, the affidavit fails to establish probable cause because the affidavit fails to state whether the CI’s observation was recent. State v. Lyons, 174 Wn.2d 354 (April 26, 2012) – June 12:13

Warrant to search father’s home for murder weapon not supported by affidavit that provided reasonable support for inference that adult son of father was connected to the homicide, but that did not support inference that the son had recently visited the father’s residence. United States v. Grant, 682 F.3d 827 (9th Cir., June 11, 2012) – October 12:05

Although portion of warrant addressing “firearms, shell cases or knives” was overbroad and lacked probable cause, that portion could be severed. State v. Temple, ___ Wn. App. ___, 285 P.3d 149 (Div. I, Aug. 20, 2012) – December 12:16

Probationer, parolee searches by CCOs

Court of Appeals upholds CCO warrantless search of probationer’s room, including memory card, under relaxed rule for probationer searches by CCOs. State v. Parris, 163 Wn. App. 110 (Div. II, August 9, 2011) – February 12:22

School authorities’ searches

Supreme Court votes 7-2 to reverse Court of Appeals and hold under article I, section 7 of the Washington constitution that warrantless search by school resource officer (SRO) was not “school search” but instead was police search. State v. Meneese, 174 Wn.2d 937 (August 2, 2012) – October 12:10

Securing MV or personal property based on probable cause to search while seeking warrant

Where officers had probable cause to believe a car contained contraband in some unknown area, compartment, or container, the officers lawfully secured the car – including a purse belonging to an occupant as to whom individualized probable cause to arrest did not exist – for a reasonable period while officers sought a search warrant for the car and its contents. State v. Campbell, 166 Wn. App. 464 (Div. III, Feb. 14, 2012) – April 12:16

Strip searches of arrested persons booked into jail or holding facility

Every person arrested and held temporarily at holding or other jail facility can be subjected to a routine strip search, so long as it involves only a visual inspection without touching or abusive gestures. The prisoner, however, may be told to manipulate some part of the body. A partial split within the five-Justice majority appears to limit this authority to prisoners who will be placed among other prisoners at the facility. Florence v. Board of Freeholders, ___ U.S. ___, 132 S. Ct. 1510 (April 2, 2012) – July 12:04

Waiver of constitutional argument by failure to timely raise

Where defendant's trial begins after new controlling constitutional interpretation, defendant does not meet Robinson test, and ordinary principles of issue preservation apply. State v. Lee, 162 Wn. App. 852 (Div. II, July 26, 2011) – January 12:24

SENTENCING

County jails must provide opportunities for inmates awaiting sentencing to earn good time credit. In re Talley, 172 Wn.2d 642 (Sept. 15, 2011) – January 12:23

Sentence provision against possessing “gang paraphernalia” too vague and therefore void under constitutional due process protection. State v. Villano, 166 Wn. App. 142 (Div. III, Jan. 26, 2012) – April 12:22

Eighth Amendment of U.S. constitution prohibits mandatory sentence of life without parole for juvenile offender in any circumstance. Miller v. Alabama and Jackson v. Hobbs, ___ U.S. ___, 132 S. Ct. 2455 (June 25, 2012) – August 12:04

SEXUAL EXPLOITATION OF CHILDREN (Chapter 9.68A)

Split panel holds that where an adult invited a minor to send him a nude photograph of herself, and she refused, her refusal precluded his prosecution for committing the completed (as opposed to attempted) crime of sexually exploiting a minor. State v. Stribling, 164 Wn. App. 867 (Div. II, Nov. 9, 2011) – March 12:20

In prosecution for attempted promotion of commercial sexual abuse of minor, State must prove defendant knew victim was a minor, but defendant may be convicted even where “victims” are adult undercover police officers. State v. Johnson, 173 Wn.2d 895 (Feb. 23, 2012) – June 12:21

SIXTH AMENDMENT RIGHT TO CONFRONTATION

Detective's testimony regarding out-of-court statements made by non-testifying witness constitutes confrontation clause violation. Ocampo v. Vail, 649 F.3d 1098 (9th Cir., June 9, 2011) – January 12:23

Defendant waived confrontation clause challenge to introduction of laboratory report in lieu of scientist's testimony where he did not demand the scientist's presence at trial as required by Criminal Rule 6.13(b), and he did not object to introduction of the laboratory report. State v. Schroeder, 164 Wn. App. 164 (Div. III, Sept. 29, 2011) – March 12:22

Supreme Court overrules its prior opinions in State v. Kirkpatrick and State v. Kronich in light of U.S. Supreme Court opinion in Melendez-Diaz. State v. Jasper, State v. Cienfuegos, and State v. Moimoi, 174 Wn.2d 96 (March 15, 2012) – June 12:19

Admission of statements of officer who served merely as interpreter does not violate evidentiary rules or defendant's rights under the confrontation clause under the facts of this case. United States v. Romo-Chavez, 681 F.3d 955 (9th Cir., May 23, 2012) – August 12:11

Victim's out of court statements were admissible under the doctrine of forfeiture by wrongdoing where the defendant clearly engaged in conduct designed to prevent the victim from testifying at trial. State v. Dobbs, 167 Wn. App. 905 (Div. II, May 1, 2012) – September 12:18 (Note: The Washington Supreme Court granted discretionary review of the Court of Appeals decision, and review is in process.)

Scientist may testify as expert regarding another scientist's report without violating the confrontation clause if the report is not being offered into evidence. Williams v. Illinois, ___ U.S. ___, 132 S. Ct. 2221 (June 18, 2012) – October 12:03

Portions of victim's statements to 911 operator and initial statements to police upon arrival at scene were, viewed objectively, made during the course of an ongoing emergency and thus are non-testimonial for confrontation clause purposes. State v. Reed, 168 Wn. App. 553 (Div. I, June 4, 2012) – November 12:18

Radiologist's report explaining that CT scan showed nasal fracture was not "testimonial" within the meaning of case law on Sixth Amendment right to confrontation, and therefore the report was lawfully admitted despite State's failure to call radiologist to testify. State v. Clark, ___ Wn. App. ___, 285 P.3d 217 (Div. I, Sept. 17, 2012) – November 12:22

Clerk's minute entry showing service of no contact order is non-testimonial and does not violate the confrontation clause. State v. Hubbard, 169 Wn. App. 182 (Div. II, June 29, 2012) – November 12:23

Police officer's testimony that victim/decedent said he feared the defendant violated the confrontation clause; however, court holds that violation is harmless. State v. Fraser, ___ Wn. App. ___, 282 P.3d 152 (Div. I, August 13, 2012) – December 12:19

SIXTH AMENDMENT RIGHT TO JURY TRIAL

No violation of defendant's right to a fair trial where "facility dog" belonging to prosecutor's office is allowed to sit next to developmentally disabled victim while the victim testifies. State v. Dye, ___ Wn. App. ___, 282 P.3d 1130 (Div. I, Aug. 27, 2012) – December 12:16

Triple-murder defendants lose because any improper law enforcement officer testimony suggesting the defendants' guilt or lack of credibility was cured by instruction. State v. Rafay and State v. Burns, 168 Wn. App. 734 (Div. I, June 18, 2012) – August 12:13

STALKING (RCW 9A.46.110)

Evidence held insufficient to convict defendant of stalking, by repeatedly following or harassing, where defendant maintained continuous physical proximity and visual contact with 87-year-old victim while on bus and after following her off of the bus. City of Seattle v. Meah, 165 Wn. App. 453 (Div. I, Dec. 12, 2011) – August 12:23

THEFT AND RELATED CRIMES (Chapter 9A.56 RCW)

Evidence is insufficient to support second degree theft conviction where only evidence of value relates to original purchase cost, not to current condition or market value of items stolen. State v. Ehrhardt, 167 Wn. App. 933 (Div. II, May 1, 2012) – September 12:20

Under license revocation provision of RCW 46.20.285, defendant “used” vehicle in the commission of a felony, taking or riding in a motor vehicle without the owner’s permission, when he unlocked the vehicle and drove away. State v. Dupuis, 168 Wn. App. 672 (Div. II, June 12, 2012) – November 12:24

THIRD PARTY PERPETRATOR THEORY OF DEFENSE

Third-party-perpetrator argument permissible only where sufficient evidence is presented tending to identify some other person as the perpetrator. State v. Hilton, 164 Wn. App. 81 (Div. III, Sept. 27, 2011) – March 12:24

Triple-murder defendants lose, because “other suspect” evidence was properly limited as speculative. State v. Rafay and State v. Burns, 168 Wn. App. 734 (Div. I, June 18, 2012) – August 12:13

TRAFFIC (Title 46 RCW) (See also topic “Implied consent, breath and blood tests for alcohol”)

In possessing stolen vehicle, defendant “used” vehicle in commission of felony for purposes of DOL suspension statute. State v. Contreras, 162 Wn. App. 540 (Div. III, July 7, 2011) – January 12:25

Automated traffic safety cameras are not proper subject of initiative power of cities. Mukilteo Citizens for a Simple Government v. City of Mukilteo, 174 Wn.2d 41 (March 8, 2012) – June 12:21

Evidence held sufficient to convict defendant of attempting to elude where defendant immediately accelerated from 25 mph to 50 mph in a 25-mph zone, frightened a pedestrian, ran a stop sign, and immediately exited his vehicle and ran once he stopped his vehicle. State v. Perez, 166 Wn. App. 58 (Div. III, Jan. 24, 2012) – August 12:21

Under license revocation provision of RCW 46.20.285, defendant “used” vehicle in the commission of a felony, taking or riding in a motor vehicle without the owner’s permission, when he unlocked the vehicle and drove away. State v. Dupuis, 168 Wn. App. 672 (Div. II, June 12, 2012) – November 12:24

UNIFORM CONTROLLED SUBSTANCES ACT (Chapter 69.50 RCW) AND OTHER DRUG LAWS (See also topic “Medical Marijuana”)

Defendant charged with manufacture and possession of marijuana should have been permitted to present an affirmative defense that he is a designated provider under the medical marijuana statute, chapter 69.51A RCW; 2011 amendments to the statute are not retroactive. State v. Brown, 166 Wn. App. 99 (Div. II, Jan. 24, 2012) – August 12:19

WORKERS’ COMPENSATION

Uniformed Seattle officer working traffic at Seattle construction site and paid by the construction company held to be employee of construction company, not City of Seattle, for workers’ compensation purposes. Gary Merlino Const. Co. v. City of Seattle, 167 Wn. App. 609 (Div. I, April 9, 2012) – September 12:22

INTERNET ACCESS TO COURT RULES & DECISIONS, TO RCWS, AND TO WAC RULES

The Washington Office of the Administrator for the Courts maintains a website with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. The address is [<http://www.courts.wa.gov/>]. Decisions issued in the preceding 90 days may be accessed by entering search terms, and decisions issued in the preceding 14 days may be more simply accessed through a separate link clearly designated. A website at [<http://legalwa.org/>] includes all Washington Court of Appeals opinions, as well as Washington State Supreme Court opinions. The site also includes links to the full text of the RCW, WAC, and many Washington city and county municipal codes (the site is accessible directly at the address above or via a link on the Washington Courts' website). Washington Rules of Court (including rules for appellate courts, superior courts, and courts of limited jurisdiction) are accessible via links on the Courts' website or by going directly to [http://www.courts.wa.gov/court_rules].

Many United States Supreme Court opinions can be accessed at [<http://supct.law.cornell.edu/supct/index.html>]. This website contains all U.S. Supreme Court opinions issued since 1990 and many significant opinions of the Court issued before 1990. Another website for U.S. Supreme Court opinions is the Court's own website at [<http://www.supremecourt.gov/opinions/opinions.html>]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since September 2000 can be accessed (by date of decision or by other search mechanism) by going to the Ninth Circuit home page at [<http://www.ca9.uscourts.gov/>] and clicking on "Decisions" and then "Opinions." Opinions from other U.S. circuit courts can be accessed by substituting the circuit number for "9" in this address to go to the home pages of the other circuit courts. Federal statutes are at [<http://www.law.cornell.edu/uscode/>].

Access to relatively current Washington state agency administrative rules (including DOL rules in Title 308 WAC, WSP equipment rules at Title 204 WAC, and State Toxicologist rules at WAC 448-15), as well as all RCW's current through 2007, is at [<http://www.leg.wa.gov/legislature>]. Information about bills filed since 1991 in the Washington Legislature is at the same address. Click on "Washington State Legislature," "bill info," "house bill information/senate bill information," and use bill numbers to access information. Access to the "Washington State Register" for the most recent proposed WAC amendments is at this address too. In addition, a wide range of state government information can be accessed at [<http://access.wa.gov>]. The internet address for the Criminal Justice Training Commission (CJTC) LED is [<https://fortress.wa.gov/cjtc/www/led/ledpage.html>], while the address for the Attorney General's Office home page is [<http://www.atg.wa.gov>].

The Law Enforcement Digest is edited by Assistant Attorney General Shannon Inglis of the Washington Attorney General's Office. Questions and comments regarding the content of the LED should be directed to AAG Inglis at Shannon.Inglis@atg.wa.gov. Retired AAG John Wasberg provides assistance to AAG Inglis on the LED. LED editorial commentary and analysis of statutes and court decisions express the thinking of the editor and do not necessarily reflect the views of the Office of the Attorney General or the CJTC. The LED is published as a research source only. The LED does not purport to furnish legal advice. LEDs from January 1992 forward are available via a link on the CJTC Home Page [<https://fortress.wa.gov/cjtc/www/led/ledpage.html>]
